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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-770

Filed: 1 August 2017

Durham County, No. 07 CVD 4521

DANA THOMPSON, Plaintiff

v.

DAVID GERLACH, Defendant

Appeal by defendant from order entered 25 February 2016 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 19 April 2017.

*Sandlin Family Law Group, by Deborah Sandlin and Rachel Goodling, for plaintiff-appellee.*

*The Law Office of Cheri C. Patrick, by Cheri C. Patrick, for defendant-appellant.*

CALABRIA, Judge.

Where the trial court's order showed defendant's ability to pay child support and alimony, and his willful failure to do so, and the trial court's general findings were accompanied by evidence in the record of defendant's assets, the trial court did not err in finding defendant in contempt for nonsupport. Where a consent order

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expressly did not supersede defendant's support obligation in a prior consent order, the trial court did not err in determining that the subsequent order did not modify defendant's obligation. Where the trial court's contempt order explicitly set out the conditions by which defendant could purge himself of contempt, the trial court's contempt order was neither impermissibly vague nor for an indefinite period.

#### I. Factual and Procedural Background

Dana Thompson ("plaintiff") and David Gerlach ("defendant") (collectively, "the parties") were married on 1 July 1989, and separated on 6 February 2007. There were three children born to the marriage. On 30 July 2008, the parties entered into a consent order ("the first order"), dividing various assets, and awarding alimony and child support. This order provided, *inter alia*, that the alimony payments "shall be non-modifiable unless the Defendant loses his job through no fault of his own or has a significant decrease in income (15% or more) through no fault of his own." On 12 March 2010, defendant filed a motion to modify alimony and child support, alleging that, in January of 2010, he lost his job after being charged with felony possession of cocaine. In this motion, defendant conceded that he was "one month behind on all court-ordered alimony and child support payments." There is no evidence in the record that any hearing was conducted upon this motion.

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On 27 October 2010, plaintiff filed a verified motion for contempt.<sup>1</sup> This motion alleged that defendant had signed a consent order, dated 4 October 2010, suspending his medical license indefinitely based upon drug use;<sup>2</sup> that defendant had failed to make support payments for the months of April through October of 2010; that the criminal charges against defendant were dismissed in July of 2010; that although defendant voluntarily surrendered his medical license, he could still obtain employment; and that defendant's failure to make support payments was willful. On 28 October 2010, the trial court entered an order to show cause based upon plaintiff's motion.

On 11 March 2011, the trial court entered a consent order ("the consent order"). This order indicated that, subsequent to the hearing on the trial court's show cause order, the parties reached an agreement on the issues. In the consent order, the trial court found that defendant's support payments were current through March of 2010; that based upon the subsequent failure to pay, defendant owed \$60,000 in child support arrears and \$36,000 in alimony arrears, and that the consent order resolved plaintiff's motion for contempt. The trial court therefore ordered defendant to pay \$27,500 immediately towards his child support arrearage, plus additional fees over

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<sup>1</sup> Plaintiff's motion for contempt refers to a prior motion for contempt and temporary restraining order, filed 12 March 2010, and orders on the same, filed 17 March 2010 and 8 April 2010. The motion also references a motion to dismiss defendant's motion to modify alimony and child support. These documents are absent from the record.

<sup>2</sup> Plaintiff's motion indicated that this consent order was attached as an exhibit. As with the other motions and orders referenced above, this order is also absent from the record.

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time to be applied to the child support arrearage, and later the alimony arrearage. The trial court also ordered defendant to pay plaintiff's attorney's fees. The trial court ordered that, should defendant enjoy a change in employment status, he must notify plaintiff within seventy-two hours. Lastly, the trial court noted that, "[e]xcept as otherwise provided for herein, the terms and provisions of the ED Consent Order, entered on July 30, 2008, remain in full-force and effect[.]" Defendant does not appeal from this order.

On 3 September 2015, plaintiff filed another verified motion for contempt.<sup>3</sup> This motion alleged that plaintiff received no payments from defendant since 2013; that defendant continued to accumulate arrearages; that defendant's medical license was reinstated in 2014; and that defendant failed to inform plaintiff of this fact as required by the consent order. That same day, the trial court entered an order to show cause based upon plaintiff's motion. On 3 December 2015, defendant moved to continue the show cause hearing, and the trial court denied this motion. That same day, defendant also moved for a more particular statement, alleging that plaintiff had not adequately stated whether she sought civil or criminal contempt. On 15 December 2015, plaintiff filed an affidavit of attorney's fees in connection with her motion for contempt, and that same day, defendant filed another motion for a more

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<sup>3</sup> Once again, plaintiff's motion made reference to various motions and orders not in the record, including a 20 September 2012 consent order requiring defendant to pay to plaintiff a portion of the proceeds from the settlement of an out-of-state lawsuit.

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particular statement, alleging that the summary of work for attorney's fees was insufficient.

On 8 December 2015, the trial court entered its contempt order ("the contempt order"), which was filed on 25 February 2016, based upon plaintiff's motion. In this order, the trial court found that defendant had failed to notify plaintiff of the fact that his medical license had been reissued and that he was practicing medicine; that defendant had a stipulated arrearage of \$307,289.89; that defendant had made no payments since 2013; that defendant's net monthly income was \$6,108.57; that his financial affidavit indicated an ability to pay \$445.14 per month towards the arrearage; that despite these assets, defendant had failed to make payments; that defendant's statement of his monthly fixed expenses was "not credible[;]" that defendant failed to produce tax returns or credit card statements; and that defendant "was able to afford certain expenses for himself and his minor children while he chose not to pay any money towards his arrears." The trial court therefore concluded that defendant willfully refused to comply with the first order and the consent order, that defendant had the ability to comply with the first order, and that defendant was in willful contempt. The court held defendant in contempt, and ordered him into the custody of the Sheriff of Durham County for a period of sixty days. The order provided that contempt could be purged by paying \$1,200 to plaintiff by 12 December 2015, and \$1,200 per month until the \$307,289.89 arrearage was paid in full.

Defendant appeals.

## II. Contempt Order

In his various arguments, defendant contends that the trial court erred in holding him in contempt, in its construction of the consent order, and in its purported failure to state the conditions needed for defendant to purge himself of contempt. We disagree.

### A. Standard of Review

The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

*Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets.

*Id.* at 66, 652 S.E.2d at 318 (citations and quotation marks omitted).

The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court's conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt, and a contemnor cannot be required to pay compensatory damages.

*Id.* at 65, 652 S.E.2d at 317 (citations and quotation marks omitted)..

B. Ability to Pay

Defendant first contends that the trial court erred in holding him in contempt, in that he lacked the ability to comply with the first order and the consent order, and that the trial court failed to make findings to the contrary.

The record demonstrates that evidence was presented to the trial court concerning defendant's assets. Among other things, the trial court heard defendant's own testimony, and received defendant's financial affidavit, which demonstrated monthly disposable assets of over \$400.

Additionally, in the contempt order, the trial court found:

16. Defendant failed to make payments on his arrearage since September 20, 2012 despite being employed and earning income. Defendant earned a total of \$15,532 in 2013 through employment with Integral Resources Inc and Total Outsourced Systems Inc., and Kelly Services in 2013. Defendant earned a total of \$15,071.00 in 2014 through employment with Total Outsourced Systems Inc.

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18. Defendant's financial affidavits of December 7, 2015 indicated a current gross monthly income of \$8,666.67 and a net monthly income of \$6,108.57. His employee earnings records from General Medical Clinic indicates he has earned this amount monthly since July 2015.

19. The Defendant's financial affidavit itemized monthly fixed household expenses of \$2,966.00 and \$1,957.43 for individual expenses for himself of \$1,957.43 and \$740.00 for his two children with his girlfriend. The Defendant's own financial affidavit indicated an ability to pay \$445.14 per month towards the arrears. Defendant failed to pay "one dime" to the Plaintiff during this time.

20. Defendant's expense of \$262.50 for malpractice insurance only started in December of 2015 since his employer paid this expense the first year of employment. The Defendant had an additional \$262.50 in December 2014 to November of 2015 and Defendant failed to pay "one dime" to the Plaintiff during this time.

21. Upon review of the Defendant's expenses the Court finds some of the Defendant's expenses not credible an/or [sic] excessive including but not limited to the following: \$100 grooming; \$100 allowance; \$200 debt service; work lunches, groceries, and household goods. Defendant testified he wasn't paying any debts owed by him.

22. Based upon Defendant's own financial affidavit, the Defendant has a monthly ability to pay \$400 to the Plaintiff towards the arrears.

23. The court considered the Defendant's testimony and finds the Defendant's monthly fixed expenses not credible and reduces them since he is not under a legal obligation to pay 100% of the fixed expenses when there is another adult living in the apartment for whom he is not married.

24. The Defendant's produced PNC bank statement (9/29/15 through 12/4/15) pursuant to the Plaintiff's

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subpoena duly issued and served upon the Defendant on November 30, 2015. The Defendant failed to produce any tax returns or credit cards statements. Defendant testified he did not filed taxes in 2013 or 2014 nor does he have any credit cards.

25. Defendant's Bank Statements indicated numerous expenses that the Defendant was able to afford certain expenses for himself and his minor children while he chose not to pay any money towards his arrears. These expenses include but are not limited to the following: weekly dining out, one expensive \$375 dinner, i-Tunes, men's clothing stores, two cell phone companies, BJ Wholesales, Hickory Tree Turkey, golf, Netflix, The Children's Place, Amazon, Perfume, Josabank, Batteries Plus, and TJ Maxx; none of these expenditures benefitted the Plaintiff and/or the Plaintiff's children for whom the Defendant was under a Court order to pay support.

26. The Defendant made numerous withdraws from the ATM during these months; often duplicate ones in the same day. Defendant testified he was in the habit of paying cash for his bills and would withdraw the money and pay his bills and then re-deposit the extra money. The Court did not find this credible.

27. The Defendant withdrew the following sums from his bank accounts through ATM:

September 29, 2015-\$503.00

October 2015-\$5,374.00

November 2015-\$2,982.00

28. Defendant also testified he gave his girlfriend's mother money to deposit in her account and pay his bills.

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Collectively, these findings reflect the trial court's determination that defendant earned, spent, and withdrew money, and was thus able to dedicate something to the payment of arrearages, but declined to do so.

On appeal, defendant contends, broadly, that he lacked the ability to pay. However, “[a] general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant’s assets.” *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318. As we noted above, the trial court had defendant’s testimony and his financial affidavit before it; we hold that these constituted “evidence in the record regarding defendant’s assets.” Despite defendant’s arguments to the contrary, the trial court found defendant’s assertions about his inability to pay “not credible[.]” Defendant’s contentions notwithstanding, the trial court’s general finding that defendant had the ability to make payments towards his arrearages was supported by the presence of evidence in the record. The trial court had the discretion to weigh the credibility of such evidence. *See Clark v. Dyer*, 236 N.C. App. 9, 27-28, 762 S.E.2d 838, 848 (2014). We will not reweigh the evidence presented to the trial court. Because there was evidence in the record regarding defendant’s assets, we hold that the trial court’s general finding of defendant’s ability to make payments was sufficient.

Defendant further contends that the trial court failed to make “clear and specific findings that show he had the ability to pay support as ordered.” This

contention is demonstrably wrong, as illustrated by the findings above. The trial court clearly found that defendant's own testimony with respect to his assets and income was not credible; that based upon his expenditures and withdrawals, defendant had the ability to pay support; and that defendant had willfully "failed to pay 'one dime'" to plaintiff. Defendant's argument fails on its face.

C. Modification of Obligation

Defendant next contends that the trial court erred in determining that the consent order did not modify defendant's monthly obligation. Defendant contends that the first order was entered in 2008, and that, in 2010, defendant filed his motion to modify alimony. Defendant contends that, despite defendant taking no further action on his motion to modify, the consent order, filed in 2011 subsequent to the earlier contempt proceeding, served as a modification of the 2008 order. Defendant contends that, because the consent order allegedly modified the first order, it reduced the \$8,000 monthly obligation listed in the first order to a \$1,000 obligation, and defendant therefore owed less in arrearages.

The first order provided that defendant would make monthly payments of \$8,000 in total for child support and alimony for the months of January 2008 through October 2011, and \$7,000 in total from November 2011 through September 2014. The order specified how these payments were apportioned between child support and alimony. The consent order provided that defendant would make monthly payments

of \$1,000 to be applied to defendant's arrearages. Nowhere did the consent order state that this was exclusive of or in lieu of those payments mandated by the first order. In fact, the consent order specified that, except as otherwise provided, the terms of the first order remained "in full-force and effect[.]"

"Where the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words." *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002). In the instant case, the plain language of the consent order indicates that the \$1,000 monthly payments were to address defendant's arrearages, not his support obligation. Defendant's contentions notwithstanding, it is clear that the purpose of the \$1,000 figure in the consent order was to address the fact that defendant had fallen behind in his payments of his support obligations.

We hold that the trial court did not err in determining that the \$1,000 obligation in the consent order was in addition to the obligations laid out in the first order.

#### D. Purge Conditions

Finally, defendant contends that the trial court erred in failing to establish specific conditions by which defendant could purge himself of contempt. Defendant contends that the contempt order failed to demonstrate that defendant could comply

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with any purge conditions, failed to list purge conditions, and failed to provide a definite date by which defendant could purge himself of contempt.

With respect to purging contempt, the trial court held that:

1. The Defendant, David Gerlach, is hereby ordered into the custody of the Sheriff of Durham County, North Carolina and shall remain in custody until such time as he purges himself of contempt of this court by complying with the following conditions; or a period of sixty days.
2. Execution of this order is hereby stayed upon the condition that:
  - A. The Defendant pays \$1,200.00 to the Plaintiff by 5:00 p.m. on December 12, 2015;
  - B. The Defendant pays \$1,200.00 to the plaintiff the 12th of each month thereafter until the arrearage of \$307,289.89 is paid in full[.]

Defendant contends that this order “requires that [defendant] go immediately to jail, and has no provisions that would allow him to purge himself of contempt.”

With respect to defendant’s ability to pay, we have already held that the trial court properly addressed that, above. There was evidence in the record of defendant’s assets, and the trial court’s general finding of ability to pay was therefore sufficient. Likewise, with respect to the conditions by which contempt could be purged, the contempt order is plain on its face: Defendant could purge himself of contempt by making monthly payments until the arrearage was paid in full.

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A contempt order “must specify how the person may purge himself of the contempt.” N.C. Gen. Stat. § 5A-22(a) (2015). An order which does not establish a date by which contempt would be purged or does not provide any other means of purging contempt is impermissible. *See Wellons v. White*, 229 N.C. App. 164, 182-83, 748 S.E.2d 709, 722-23 (2013). We acknowledge that the contempt order in the instant case did not include an explicit end date. However, such a date is a calculable fact, given that defendant is no longer accruing arrears. Defendant’s purge obligation, to make monthly payments of \$1,200, terminates when his arrearage is paid in full. While defendant protests that this would require him to make payments for more than 21 years, that time is not indefinite; defendant’s own contention demonstrates that the end date is clear and determinate. Further, this obligation arose from defendant’s failure to comply with the trial court’s prior orders; this arrearage is the result of defendant’s delinquency in payment, and this contempt order serves to incentivize defendant to comply with the prior court orders by making those payments he failed to make in the past. The alternative would be to risk defendant once more becoming delinquent and noncompliant, resulting in yet another contempt proceeding.

As such, we hold that the purge conditions set out in the contempt order are neither indefinite in duration nor impermissibly vague, and that the trial court did not err in imposing them.

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AFFIRMED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).